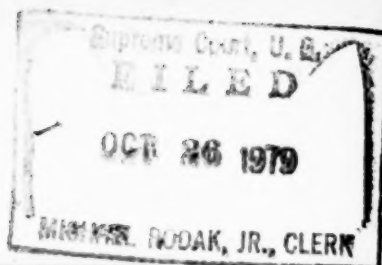


No. 79-177



In the Supreme Court of the United States

OCTOBER TERM, 1979

PHILIP R. JACKA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. i-xiii) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1979. By order dated June 25, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including July 30, 1979 (Pet. App. xvi). The petition for a writ of certiorari was filed on August 1, 1979.¹ The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹The petition was therefore filed two days beyond the time limit provided by Rule 22(2) of the Rules of this Court.

QUESTION PRESENTED

Whether petitioner's conviction for willful failure to file tax returns was barred by the Fifth Amendment privilege against compulsory self-incrimination.

STATEMENT

Following a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted on three counts of willful failure to file income tax returns for 1974-1976, in violation of 26 U.S.C. 7203 (Pet. App. ii; R. 68).² The trial court sentenced him to six months' imprisonment on the first count, imposed a \$2,000 fine on the second count, and sentenced petitioner to five years' supervised probation on the third count, to commence after completion of the prison term (R. 72, 73, 103).

The evidence at trial established that petitioner's tax returns were due to be filed on or before April 15 of the year following the taxable years at issue and that petitioner was required to file a return for each year if he received gross income of \$2,800 in 1974, \$3,400 in 1975, and \$3,600 in 1976 (Tr. 28-30, 37, 38-39, 174-175). The evidence further established that petitioner, who is a pipefitter, had gross income from wages of \$24,019.44 in 1974, \$16,767.13 in 1975, and \$21,528.21 in 1976 (Tr. 47, 49, 59-60, 63-64, 66-68, 70-71, 75, 78, 88, 92, 95, 174-175).

Sometime prior to April 15, 1975, petitioner filed a document which purported to be his tax return for 1974 (Tr. 19-20, 38; Govt. Ex. 3). That document, which was a Form 1040 for 1974, was dated March 19, 1975. It listed petitioner's name and that of his wife, was signed by

²"R." refers to the record on appeal. "Tr." refers to the trial transcript.

petitioner and his wife, listed their address, their social security numbers, interest income received, federal income tax withheld, and other payments received, and claimed a refund of \$3,801 (Govt. Ex. 3). Petitioner inserted the words "Object—Self-incrimination" in the blanks on the Form 1040 calling for his occupation, wages received, the computation of tax and the taxes due. He wrote the word "None" in all other blanks. Petitioner attached to the Form 1040 various materials, including, *inter alia*, two pages containing short synopses of various cases involving Fifth Amendment questions, copies of several newspaper articles, and a copy of a document entitled "Tax Protestor Declaration of Independence" (*ibid.*).

Following the filing of this document, Special Agent Lyle Bjorn was assigned to determine whether petitioner had sufficient income to require him to file a tax return for 1974 (Tr. 100). On August 21, 1975, Agent Bjorn wrote petitioner, advising him, *inter alia*, that the Form 1040 that he filed for 1974 was not acceptable as a tax return and that Bjorn was investigating possible criminal violations by petitioner for willful failure to file a tax return and for furnishing false withholding information to one of his employers (Tr. 102-103, 105-106; Govt. Ex. 21-A).³ Subsequently, petitioner told the agent that he was not going to correct the Form 1040 he had filed and that his reason for submitting the type of return he filed was that he did not "believe in paying taxes on taxes" and because "he felt that taxes were unconstitutional" (Tr. 107-109).

³The Internal Revenue Service had previously sent petitioner a similar letter on April 22, 1975 (Tr. 101-105; Govt. Ex. 21).

Thereafter, petitioner did not file any tax returns until August, 1977 (Tr. 37-40). At that time, petitioner filed a purported amended tax return for 1974, a purported amended tax return for 1975 (despite the fact that he had never filed an original return for that year), and a purported tax return for 1976 (Tr. 24-25, 37-40; Govt. Exs. 4-6). These documents, which were Forms 1040 for the particular years, were essentially identical in all respects. Each form contained petitioner's name and address, but none of them were signed or dated. The word "Object" was written in almost every blank on the forms. Attached to each Form 1040 was a multi-page printed form, upon which petitioner's name was written in the appropriate blanks. These printed forms advised the Internal Revenue Service that petitioner, in refusing to file completed tax returns, was relying upon his rights under the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Fourteenth and Sixteenth Amendments; all other rights listed in the Constitution; the fact that there was no lawful money in circulation; and his belief that tax revenues were being put to improper uses. A part of each multi-page printed form was a printed affidavit, which petitioner signed and dated; this affidavit advised the Internal Revenue Service that petitioner believed the filing of a completed tax return could incriminate him because, *inter alia*, the Service could find something wrong with any return and because he believed that he might be prosecuted for perjury if he filled out his tax returns according to his understanding of the term "dollar" (*ibid.*).

On the first day of trial, petitioner moved to dismiss the information. He asserted that he was entitled to claim the Fifth Amendment privilege on his tax returns and refuse to supply any information from which tax liability could be computed because the government could have used

such information against him in an earlier prosecution for filing false withholding exemption certificates (Forms W-4E), which related to some of the years in issue in this case (Tr. 7-10).⁴ The court denied the motion (Tr. 12). At the conclusion of the government's case, petitioner urged the same grounds in seeking a judgment of acquittal (Tr. 214-215). The court also denied this motion (Tr. 218), and a subsequent similar motion to set aside the jury verdict (R. 69-71).

The court of appeals affirmed. It held that there was sufficient evidence in the record to support the jury's determination that petitioner acted willfully in failing to file tax returns (*i.e.*, that petitioner was not invoking his Fifth Amendment rights in good faith), and, at all events,

⁴A withholding exemption certificate (Form W-4E) is used to terminate the withholding of all income taxes by an employer. The form, which must be signed under penalty of perjury, recites that the employee incurred no tax liability in the previous year and anticipates no tax liability for the current year.

Petitioner contended that he had been tried and acquitted on December 26, 1976, on three counts charging him with filing false withholding exemption certificates (Tr. 7-8, 11). Special Agent Bjorn testified on cross-examination that those charges related to 1974 and 1975 (Tr. 116). Bjorn also testified on cross-examination that petitioner had continued to file withholding exemption certificates "covering" 1976 (*ibid.*). Agent Bjorn admitted on cross-examination that information supplied by a taxpayer in a tax return could be used against him in a prosecution for filing a false withholding exemption certificate (Tr. 116, 118, 152). Chester Spangler, another Internal Revenue Service employee, made the same point (Tr. 36-37).

Petitioner correctly asserts (Pet. 27) that he filed eight withholding exemption certificates with his employers from August 19, 1974, through April 18, 1977. Petitioner was tried and acquitted on charges that he filed false withholding exemption certificates on June 23, 1975; July 24, 1975; and April 6, 1976. He also filed withholding exemption certificates with his employers on August 19, 1974; December 17, 1975; January 21, 1976; February 2, 1976; and April 18, 1977.

that the fifth Amendment privilege does not permit a taxpayer to avoid disclosure of information on a tax return from which the tax liability for the year can be determined (Pet. App. i-xiii).

ARGUMENT

I. Petitioner argues (Pet. 17-20) that there was a possibility that information on his tax returns from which tax liability could have been computed might have been used to prosecute him for filing false withholding exemption certificates. He therefore concludes that he was entitled to invoke his Fifth Amendment privilege and refuse to supply such information on his tax returns, and that his convictions should be set aside.

But petitioner's argument is irrelevant with respect to the convictions for 1975 and 1976. Moreover, the evidence adduced at trial refutes petitioner's claim for 1974. Section 7203 of the Internal Revenue Code provides that any person who willfully fails to make a return "at the time or times required by law" shall be guilty of a misdemeanor. As to 1975 and 1976, the evidence established that petitioner's tax returns for those years were due to be filed on or before April 15, 1976 and 1977 (Tr. 30, 39-40) and that petitioner did not file anything for those years until August 1977 (Tr. 39-40; Govt. Exs. 5, 6). Petitioner did not file anything on or before the due dates for returns for 1975 and 1976, and it, thus, cannot be disputed that he failed to file for those years. *United States v. Greenlee*, 380 F. Supp. 652, 660 (E.D. Pa. 1974), *aff'd*, 517 F.2d 899 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975). See also *United States v. Bourque*, 541 F. 2d 290,

294 (1st Cir. 1976); *United States v. Ming*, 466 F. 2d 1000 (7th Cir.), *cert. denied*, 409 U.S. 915 (1972); *United States v. Cotter*, 425 F. 2d 450 (1st Cir. 1970).⁵

It is well established that the privilege against self-incrimination does not permit a taxpayer to refuse to make any return at all. *United States v. Sullivan*, 274 U.S. 259, 263 (1927). Petitioner's failures could therefore not be excused by his Fifth Amendment privilege against self-incrimination. Indeed, even on the assumption that the materials petitioner filed in August, 1977, could be considered tax returns, a late filing does not satisfy the requirement of filing a tax return on or before the due date and is not a defense to a failure to file charge under Section 7203. *United States v. Greenlee*, *supra*, 380 F. Supp. at 660.

At all events, a Form 1040 that does not supply any information from which a tax liability can be computed is not a proper tax return for purposes of the filing requirements of the Internal Revenue Code. *United States v. Irwin*, 561 F. 2d 198, 201 (10th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978); *United States v. Radue*, 486 F. 2d 220, 222 (5th Cir. 1973), *cert. denied*, 416 U.S. 908 (1974); *United States v. Porth*, 426 F. 2d 519, 523 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970). None of the materials

⁵The trial judge instructed the jury that the information charged petitioner with failing to file tax returns on or before April 15 of the year following the taxable year (Tr. 269-271) and that Section 7203 made the willful failure to file a tax return at the time required by law a criminal offense (Tr. 271).

petitioner filed (either the purported 1974 tax return⁶ or the materials filed in August 1977) supplied any information from which his tax liability could be computed.

2. Petitioner nevertheless argues (Pet. 29-30) that he properly invoked his privilege against self-incrimination and refused to supply any information on the forms because of the possibility that such information could have been used to incriminate him for filing withholding exemption certificates in which he asserted that he had not incurred any tax liability for the years for which tax returns were due. But the burden of establishing entitlement to claim the privilege is upon the one asserting it. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Here, the court of appeals properly determined (Pet. App. iv-v) that there was sufficient evidence before the jury from which it could conclude that petitioner had not established that his actions were motivated by a specific fear of prosecution for filing false withholding exemption certificates but that his claim was a mere after thought.

⁶Under the facts of this case, petitioner was not entitled to claim the Fifth Amendment privilege on the purported tax return he filed prior to April 15, 1975 (Govt. Ex. 3). The only withholding exemption certificates which related to this document were filed on August 19, 1974; June 23, 1975; July 24, 1975; and December 17, 1975. The certificate filed in 1974 stated that petitioner incurred no tax liability in 1973 and anticipated no tax liability in 1974. Had petitioner revealed in the purported 1974 tax return filed in 1975 that he had in fact incurred a tax liability in 1974, that return could not have been used to show that petitioner falsely stated in 1974 that he anticipated no tax liability for that year. The certificates filed in 1975 stated that petitioner incurred no tax liability in 1974 and anticipated none in 1975. But each of these certificates were filed after petitioner filed his purported return for 1974. Surely petitioner could not claim the privilege and refuse to supply information from which a tax liability could be computed on the ground that he intended in the future to state falsely that he had incurred no tax liability in 1974.

It is undeniable that the words "Object—Self-incrimination" were inserted in the blanks on the Form 1040 for the 1974 tax year calling for the petitioner's occupation, the wages received, the computation of tax and the taxes due (Govt. Ex. 3). But there was nothing in the attachments to the form, which revealed a general opposition to the taxing system, indicating that petitioner was invoking the privilege because he feared he would incriminate himself as to any specific violation. Moreover, when Agent Bjorn asked petitioner why he had filed an incomplete return, he stated that he had done so because he did not "believe in paying taxes on taxes" and because "he felt that taxes were unconstitutional" (Tr. 108-109), not that he feared incrimination from a complete response.

The materials filed by petitioner in August, 1977, contained the word "Object" in the blanks calling for occupation, wages received, computation of tax and taxes due (Govt. Exs. 4-6). But the word "Object" was also inserted in every other blank but one, and the materials were not signed or dated. Numerous objections to the taxing system were raised in the materials attached to these forms, and although the Fifth Amendment was one of the objections asserted, the affidavit in which petitioner stated his Fifth Amendment claim in some detail did not mention a fear of incrimination with respect to withholding exemption certificates but instead asserted only that petitioner feared he could be incriminated if he filled out the Forms 1040 because the Internal Revenue Service could find something wrong with any return and because he believed that he might be prosecuted for perjury if he filled out his tax returns according to his understanding of the term "dollar". (See Attachments to Govt. Exs. 4-6.)

From all of this evidence, the jury could have reasonably concluded⁷ that petitioner filed incomplete Forms 1040 (Govt. Exs. 3-6) not because he feared prosecution for filing false withholding exemption certificates, but because he objected generally to the taxing system and was trying to evade his duty to file tax returns and pay taxes.⁸

⁷The trial court instructed the jury, in part, as follows (Tr. 277-278):

You are instructed that a valid and timely claim of the Fifth Amendment privilege or a claim of privilege made in good faith, but erroneously may negate the element of willfulness * * *.

It, therefore, is the duty of the jury to determine whether or not the reason for the Defendant's claim of the Fifth Amendment was based on a good faith mistake or on a real possibility of criminal prosecution or whether the Defendant's refusal to supply information on grounds of claim of privilege was willful, that is, was motivated by some bad purpose such as a desire to impede, harass, delay, or evade the payment of taxes.

* * * * *

* * *The failure to make a timely return is willful if the Defendant's failure to act was voluntary and purposeful and with specific intent to fail to do what he knew the law requires to be done; that is to say, with a bad purpose or motive or [sic] disobey or disregard the law, which requires him to file a timely return which discloses to the Government the facts material to the determination of his income tax liability.

* * * * *

On the other hand, the Defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accidents, or reckless disregard for the requirements of law, or due to his good faith misunderstanding of the requirements of the law.

⁸Petitioner also argues (Pet. 20) that the validity of a claim of privilege is not a question for the jury unless the claim is erroneous. But even if this is the case, allowing the jury to pass on both the validity and the good faith exercise of the privilege gave petitioner more than he was entitled to. Because the evidence established that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1979

petitioner had not in good faith invoked the privilege against self-incrimination, there is no need for this Court to consider whether the court of appeals correctly held that the privilege against self-incrimination does not permit a taxpayer to avoid disclosure of information on a tax return from which the tax liability for the year can be determined. See *Garner v. United States*, 424 U.S. 648 (1976); *California v. Byers*, 402 U.S. 424 (1971).